years younger than Rustam and there is nothing to indicate that she could not have lived according to the testator's expectations for another 14 years at least after Rustam's death during which time she would have been receiving Rustam's share. It is not as if she were older than Rustam. The testator had already made one provision for the two appellants under proviso (ii). If it had been his intention to benefit them twice altogether he could quite easily have said "and on her death" in proviso (iii) but he did not. There is accordingly nothing in the language of the will, the scheme of the whole will and the surrounding circumstances, taken as a whole, which impels us to say that the testator has not expressed his intentions in plain and unambiguous language when he said "or if she shall then be dead".

We would accordingly agree with the judgment of the learned Chief Justice and dismiss this appeal.

Appeal dismissed.

Solicitors: *Mallal & Namazie; Drew & Napier; Rodyk & Davidson.*

MALAYSIAN REPORTS

RAJAGOPAL v. RAJAN

[F.C. (Ong C.J. (Malaya), Gill F.J. and Ong Hock Sim J.)

April 1 1971]

[Ipoh — Federal Court Civil Appeal No. X 16 of 1966]

Defamation — Libel — Letter written in pursuance of resolution tabled at annual general meeting — Contents of — Per se defamatory — Whether defence of qualified privilege available — Finding of malice — Effect of.

Damages — Libel — Circumstances taken into account in computation of quantum.

This was an appeal from a judgment of the High Court. The learned trial judge had found that a letter with enclosures sent by the appellant was *per se* of a defamatory character. He rejected the defence of qualified privilege on the ground that the appellant had exceeded his duty as secretary of the branch of the Malayan Indian Congress by sending copies of the resolution to persons he was not required to send and he had been responsible for the forwarding the letter which made allegations containing defamatory imputations. He found evidence of express malice and rejected the evidence of fair comment.

Held, dismissing the appeal: (1) there was no reason for disagreeing with the learned trial judge's finding that the forwarding letter was *per se* defamatory;

(2) there was evidence to warrant the conclusion that the appellant had been actuated by malice and that the defence of qualified privilege was not available to the appellant;

(3) as there was malice, the defence of fair comment could not succeed.

Cases referred to:-

(1) *Brown* v. *Croome* (1817) Starkie (NP) 297; 171 E.R. 652.

(2) *Thomas* v. *Bradbury, Agnew & Co. Ltd.* [1906] 2 K.B. 627 at p. 642.

(3) *Sutherland* v. *Stopes* [1925] A.C. 47 at p. 63.

FEDERAL COURT.

Dato' Athi Nahappan with *D.P. Vijandran* for the appellant.

Dato' S. P. Seenivasagam with *Paramjit Singh Gill* for the respondent.

Cur. Adv. Vult.

Ong C.J. (Malaya): I have had the advantage of reading the judgment of my brother Ong with which I am in full agreement and have nothing to add.

I would dismiss the appeal with costs.

Ong Hock Sim J.: The appellant was, with one K. Thangavelu, the defendant in an action brought by the respondent claiming damages for libel contained in a letter dated the 11th June, 1963 and the resolution passed at the annual general meeting of the Kuala Kangsar branch of the Malayan Indian Congress held on the 2nd June, 1963. The action against the said Thangavelu abated by reason of his death as a result of a motor accident and in the event, judgment was given against the appellant alone in the sum of $1,500/- as damages and costs.

The parties to the action were all members of the said Kuala Kangsar branch at all material times. The deceased Thangavelu was president and the appellant, the secretary. The respondent complained that the appellant had published certain documents, namely

the letter of the 11th June, 1963, which contained defamatory imputations against him and appear in paragraphs 3 and 5 of the statement of claim, which I now set out with the alleged offending words underlined:

"3. On or about 11th June, 1963 the defendants falsely and maliciously wrote and published or caused to be written and published of the plaintiff in the form of a type written letter and a resolution hereinafter referred as the said document, the following words that is to say.

'President: Tel. No. KK 78
K. Thangavelu, P.J.K.
Hon. Secretary:
A. Rajagopal

MALAYAN INDIAN CONGRESS
Kuala Kangsar Branch,
c/o Indian Association,
Kuala Kangsar.
11th June, 1963.

Dear Sir,

I am directed by the General Body of the M.I.C., Kuala Kangsar at its Annual General Meeting held on 2nd June, 1963 at 5.30 p.m. in the Indian Association Premises under the Presidentship of the M.I.C. President, Perak State, Mr. D.S. Dorai Raj, A.M.N., P.J.K., to forward a Resolution passed by the House for your information and such action you may consider necessary in the interest of the peace of the Indian Citizens of Kuala Kangsar.

I may be permitted to bring to your notice that though M.I.C. is a political body for Indians in Malaya, yet it is an integral part of the Alliance, which consists of the major population in Malaya. The unrest caused by a few amongst Indians of Kuala Kangsar, has therefore disturbed the peace of other communities as well. These few persons have even dared to give publicity to their vanity through the Malayan Newspapers and thus spoiled the good name of one of the most peaceful and useful branch of the M.I.C. in Malaya. The branch consists of more than 700 members.

These people have even gone to the extent of challenging the State and Federal Headquarters authorities through their letters and the press statements. The Federal Headquarters is under the Presidentship of the Honourable Dato V.T. Sambanthan, Minister of Works and Posts.

The General body has specially asked me to inform you that unless such undesirable activities of these gentlemen are nipped in the bud, it might lead to results which would be undesirable to the harmony and peace of Kuala Kangsar in particular and Malaya in general, particularly when these people are working in Government Schools and Courts.

I would be grateful if you could acknowledge this letter.

Yours faithfully,
Sd. A. Rajagopal
Hon. Secretary.

I am further to inform you that the carbon copies of this letter have been sent to the following:

1. Honourable, The Minister of Internal Security, K. Lumpur.
2. Honourable, The Minister of Education, Kuala Lumpur.
3. Honourable, Dato V.T. Sambanthan, Minister of Works & Posts, National President, M.I.C. Headquarters, K. Lumpur.
4. Chief Education Adviser, Ministry of Education, K. Lumpur.
5. Chief Education Officer, Perak, Ipoh.
6. Chairman, Board of Governors, Malay College, K. Kangsar.
7. Deputy Chairman, Board of Governors, Malay College, Kuala Kangsar.
8. Honourable Judge, High Court, Ipoh.
9. Honourable President, Sessions Court, Taiping.
10. The Headmaster, Malay College, Kuala Kangsar.
11. The Chief Police Officer, Perak, Ipoh.
12. O.S.P.C., Kuala Kangsar.
13. Honourable Mentri Besar, Perak, Ipoh.
14. Honourable State Secretary, Perak, Ipoh.
15. The Deputy Mentri Besar, Perak, Ipoh.
16. The Hon. Assistant Minister of Labour, National Vice President, M.I.C. Headquarters, Kuala Lumpur.
17. Mr. D.S. Dorai Raj, A.M.N., P.J.K., Honourable President, M.I.C. Perak.
18. Mr. KR. Ramalingam, P.J.K., Honourable Secretary, M.I.C., Perak.
19. The General Secretary, M.I.C. Headquarters, Kuala Lumpur.

M.I.C., Kuala Kangsar.
A. Rajagopal
Hon. Secretary.'

The good name of one of the largest and peaceful M.I.C. branch of Kuala Kangsar has been disreputed by irresponsible and callous behaviour and action respectively of three of its new members namely: 1. G.T. Rajan, Malay College, Kuala Kangsar, 2. Mr. K. Ramachandran, Tamil Interpreter, Magistrate's Court, Kuala Kangsar, 3. Mr. U. Krishnan, Laboratory Attendant, Malay College, Kuala Kangsar.

I urge the House to condemn their destructive attitude towards the M.I.C., which is an integral part of the Alliance.

RESOLUTION

'The M.I.C. Branch resolves that 1. Mr. G.T. Rajan, teacher, Malay College, Kuala Kangsar, 2. Mr. K. Ramachandran, Tamil Interpreter, Magistrate's Court, Kuala Kangsar, 3. Mr. U. Krishnan, Laboratory Attendant, Malay College, Kuala Kangsar have indulged in activities detrimental to M.I.C. and well unity of the Indians in Kuala Kangsar thereby also disrupting the good name of our Branch. As the unquestionable loyalty of the Indians in Kuala Kangsar is in danger of disruption, this House condemns the above three members of our branch.

This House also resolves to send a copy of this resolution, one to each of the head of department of the above three gentlemen and also to M.I.C. Headquarters, Kuala Lumpur.

Malayan Indian Congress,
Kuala Kangsar Branch.
A. Rajagopal
Hon. Secretary.

5. By the said words the defendants meant and were understood to mean that the plaintiff had been guilty of causing unrest among the people in Kuala Kangsar and have disturbed the peace of several communities, in Kuala Kangsar and have indulged in such undesirable activities which are sufficient for the various persons to whom the copies of the documents have been sent to act upon such manner that are detrimental to the plaintiff that is to say:—

(a) The Minister of Internal Security may order the plaintiff be deported from Malaya.

(b) The Minister of Education or officers of his Ministry namely Chief Education Adviser, Kuala Lumpur, The Headmaster of Malay College, Kuala Kangsar, and Chairman and Deputy Chairman, Board of Governors, Malay College, Kuala Kangsar, may order dismissal of the plaintiff from teaching or act against the interest of the plaintiff's profession.

(c) The President and the Vice President of the M.I.C. would consider the plaintiff as an irresponsible and undesirable member of the political organisation.

(d) In order to prejudice the reputation of the plaintiff in the estimation of the Judge, High Court, Ipoh, President, Sessions Court, Taiping, Mentri Besar, Perak, Ipoh, State Secretary, Perak, Ipoh, The Deputy Mentri Besar, Perak, Ipoh.

(e) The Chief Police Officer, Perak, Ipoh or O.S.P.C., Kuala Kangsar may order that the plaintiff be arrested or do such actions which are likely to interfere with liberty and freedom of the plaintiff."

Appended to the resolution was a speech made by the member who introduced the resolution. The trial judge dealt with the events leading to the passing of the resolution and I may shortly sum up these events. There was scheduled to be held on the 12th March, 1963 the annual general meeting of the Kuala Kangsar branch at which office bearers for the ensuing year were to be elected. The respondent and some others had tabled certain questions to which they desired answers. At such meeting it was the practice for a representative from the State Malayan Indian Congress to preside. On this occasion he failed to show up and the respondent had an exchange of words with the said Thangavelu and behaved, as the learned judge said, in a manner which is not expected of a member towards the president of his party. The respondent and his friends were dissatisfied over the nomination of candidates for the local Town Council elections and charged that nepotism had been practised. They had planned to raise these matters at the meeting but the said Thangavelu adjourned that meeting after an exchange of words with the respondent over the failure of the State Malayan Indian Congress President to turn up about one and a half hours after the scheduled time. The respondent and some 97 others then sent a petition for an extraordinary general meeting, with a copy to the Alliance Committee in Kuala Kangsar. The State Malayan Indian Congress disapproved the sending of a copy of the petition to the Alliance Committee as it regarded the dispute as a purely internal affair. The petition was unsuccessful and the respondent and his friends took upon themselves to sponsor a meeting of the branch in violation of the constitution of the branch. Notices were sent and statements released to the press. These acts, the learned trial judge said, earned the respondent and his friends the displeasure of the committee. Eventually a meeting was held on the 2nd June, 1963 when the resolution complained of was passed condemning the respondent and two named persons for bismirching the good name of the branch and disturbing the loyalty and unity of the Indians in Kuala Kangsar.

The defence of the appellant to the respondent's claim was a denial that the documents contained defamatory imputations concerning the respondent. The appellant further pleaded qualified privilege and fair comment.

The learned judge found the forwarding letter to be of a defamatory character. He rejected the defence of qualified privilege on the ground that he had exceeded his duty as secretary of the branch by sending copies of the resolution to persons he was not required to send and had been responsible for the forwarding letter which made allegations he found contained defamatory imputations and there was also evidence of express malice. He also rejected the defence of fair comment.

Before us, the appellant contends that upon the pleadings, the action should have been dismissed on the ground that paragraph 3 of the statement of claim did not allege the words complained of were defamatory in their natural and ordinary meaning and that paragraph 5 did not comply with the requirements of R.S.C., Order 19 rule 6(2). He says that if the words were defamatory *per se*, the respondent would not have been called to prove his case. At the outset of the case, counsel for the respondent submitted that the words were *ex facie* defamatory and stated he did not propose to call evidence to prove they were. The court was then adjourned for a ruling whether the words referred to in the statement of claim were defamatory. When appellant's counsel commenced his address, it was again confirmed by respondent's counsel that plaintiff urged that the words were defamatory with or without *innuendo*. The learned judge said that the main question for consideration was whether the documents contained defamatory statements as alleged in paragraphs 3 and 5 of the statement of claim. In deciding whether the words complained of were *per se* defamatory, it would be necessary to construe the words in their natural and ordinary meaning in the sense in which reasonable men of ordinary intelligence would be likely to understand them. Where, as alleged by paragraph 5, that the words complained of have a secondary meaning by *innuendo*, consideration must be taken as to the manner of their publication and the persons to whom they were published.

It was evident that the learned judge had considered the resolution, the letter forwarding it and the speech of the member introducing the resolution. He ruled out the resolution as defamatory, but came to the conclusion that the same view could not be taken of the forwarding letter and the speech in that they contained allegations that the respondent and his friends had been indulging in some form of activity which threatened the public peace and suggested that the activities of the respondent and his friends be nipped in the bud to avoid results which would be undesirable to the peace and harmony of Kuala Kangsar in particular and Malaya in general. This forwarding letter was addressed and sent to the Minister of Internal Security and high-ranking police officers who are responsible for the preservation of peace of the country. At the trial, the appellant was asked by his counsel what he meant when he used the words complained of, *e.g.* "unrest", "by a few", "undesirable activities", "nipped in the bud", "harmony and peace" *etc.* as well as his reasons for sending to the various addresses. It is not what the appellant meant that is relevant in construing whether the words are defamatory but what the words convey to a reasonable person to whom they are published. As the learned judge said any reasonable person reading the letter and noting the manner it was published would be inclined to the view that the respondent and his friends had been guilty of acts which might necessitate departmental inquiry, which did, in fact, follow. (See evidence of PW.2 Nicholas Caleb, an officer of the Education Department, and PW.3 Kee Kong Bee, a Special Branch Officer, sent by Chief Education Officer, Perak, and O.S.P.C. Kuala Kangsar respectively to inquire and investigate into the contents of the letter). The learned judge further said "unless he is fully aware of the actual circumstances which had led to the passing of the resolution" As is said in *Gatley* (5th Edn) section 196 at page 118: "there may be other passages which take away their sting", but these facts which could have perhaps qualified their ordinary meaning, he

found, had been deliberately omitted for the sole purpose of causing embarrassment to the respondent. He was satisfied further that the letter imputed some dishonourable motive or conduct as may fairly be open to contempt. It may not be out of place to note that the appellant was aware of the implications of his letter. He says under cross-examination:

"I know that Minister of Internal Security's duty is to detain and punish people who are a threat to the security of the country. Yes, I wrote that plaintiff was a threat to security of Kuala Kangsar in particular and Malaysia in general."

The appellant further agreed that if the Minister after reading the letter, was satisfied, he would have to do his duty and detain the respondent. He says:

"I expected these people to be watched. I expected Minister to do his duty and not to advise plaintiff (respondent). Yes, I expected him to exercise his power as a Chief Police Officer in case there was a disturbance of the peace."

In the event he held the forwarding letter to be of a defamatory character. I can see no reason, in view of the foregoing, for disagreeing with the learned trial judge's finding that the forwarding letter was *per se* defamatory. I also consider that this is not the time or place to raise complaints as to the pleadings and I agree with counsel for the respondents that the appellant was in no way embarrassed or prejudiced.

On the finding that the forwarding letter was *per se* defamatory, it remains now to deal with the defence of qualified privilege. The appellant had claimed that the document was written and published by him in his capacity as secretary of the Malayan Indian Congress, Kuala Kangsar branch and in the interests of the said body and of the Malayan Indian Congress of the Federation of Malaya and in pursuance of a resolution of the Malayan Indian Congress, Kuala Kangsar branch and on a privileged occasion. In a case in which it is sought to rely on this defence, it is for the defendant to prove the facts and circumstances which establish that occasion as privileged. If he does that, the burden of showing actual or express malice rests upon the plaintiff and, if this is shown, communications made, even on a privileged occasion, can no longer be regarded as privileged. (*Halsbury's* Laws of England (3rd ed.), Vol. 24, section 98, page 55.) In paragraph 2 of his reply, the respondent had charged the appellant with express malice. It is true the learned judge found that the appellant was acting in pursuance of his duty as secretary within the scope of the resolution and was under a duty to obey. But in sending copies of the resolution to persons he was not required to send, he had abused his position. As is said in *Brown* v. *Croome*: [1]

"The fact that a communication between A and B is privileged does not justify A in making the communication in a manner or at a time which would involve its publication to other persons who have no such interest or duty. No privilege would *prima facie* attach to the publication."

The forwarding letter had been drafted by the appellant in consultation with one Manikam (D.W.4) and translated by the latter into English. The appellant had said that he expected the Minister of Internal Security and the Chief Police Officer to act upon his letter. The learned judge had come to the view that the appellant had conceived sending the letter following the insulting remark made by the respondent — and obviously intended to refer to him — that "barbers have come into politics." There was, he further said, deliberate suppression of the true facts concerning the activities which the respondent had been indulging in, calculated to cause considerable embarrassment to the respondent. "Malice which avoids qualified privilege is ill-will or spite or any indirect or improper motive in the mind of the defendant at the time of publication and actuating it." (*Halsbury's, ibid*, section 138, page 79). In my view, there is evidence on the record to warrant the conclusion that the appellant had been actuated by malice and that the defence of qualified privilege was not available to the appellant.

The learned judge said there had been no plea of justification and on the defence of fair comment he would confine himself to the forwarding letter and said the contents therein which alleged that the respondent had been guilty of causing unrest and disturbing the peace of the people in Kuala Kangsar and of having been engaged in undesirable activities which might lead to a breach of the peace were not comments but allegations of fact. He had earlier in his judgment found the allegation false and being false afforded no answer to the action. He refers to section 592 at page 329 of *Gatley*:

"If what is intended to be comment appears in the guise of a fact, and there is nothing to show on what it is based, then it must be treated as a statement of fact which may be protected by a plea of justification but not by one of fair comment."

I may add that on the finding of malice when dealing with the defence of qualified privilege, the defence of fair comment is thereby equally defeated. (*Thomas* v. *Bradbury, Agnew & Co. Ltd.*[2]). As is stated by Viscount Finlay in *Sutherland* v. *Stopes*: [3]

"Such a defence on the ground of fair comment will fail if the jury is satisfied that the libel was malicious."

I see no reason for disagreeing with the conclusions of the learned trial judge and accordingly this appeal is dismissed with costs.

The appellant has also appealed on the quantum of damages awarded. I am of the opinion that the learned trial judge had given every consideration on the question of damages and appreciated the difficulty. As he said, in coming to his decision on the quantum, he took into account the fact that the appellant made no attempt to apologise but sought instead to justify the publication as a form of criticism and fair comment. It was not a case in which he thinks nominal damages would have been sufficient. The respondent's reputation, he found, had been injured. In all the circumstances, I do not consider it proper that I should interfere with the quantum awarded and would also dismiss the appeal on quantum.

Gill F.J. concurred.

Appeal dismissed.

Solicitors: *Athi Nahappan & Co.; Maxwell, Kenion, Cowdy & Jones.*